

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION**

CRIMINAL NO. 1:04CR64

UNITED STATES OF AMERICA

vs.

KEVIN CHRISTOPHER MAKERSON

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ORDER

THIS MATTER is before the Court on the Defendant's motion to file an untimely notice of appeal. **Defendant's Notice of Appeal, filed November 7, 2008.** Defendant wishes to appeal this Court's order, dated September 5, 2008, which denied his motion for reduction of sentence for his crack cocaine conviction based on amendments to the Sentencing Guidelines and 18 U.S.C. § 3582(c)(2). ***Id.* at 1; see Order, filed September 5, 2008.** He claims that his attorney did not notify him of the challenged order until October 31, 2008 – nearly two months after its issuance. **Notice of Appeal, *supra*, at 1.** To support his claim, he encloses a copy of an envelope which he received from his attorney, postmarked October 27, 2008. ***Id.* at 6.**

The Federal Rules of Appellate Procedure provide:

Upon a finding of excusable neglect or good cause, the district court may – before or after the time has expired, without or without motion and notice – extend the time to file a notice of appeal *for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).*

Fed. R. App. P. 4(b)(4) (emphasis added). Rule 4(b) also states that criminal defendants must ordinarily file their notice of appeal within 10 days from the issuance of the order they wish to challenge. **Fed. R. App. P. 4(b)(1)(A)(i).**

In this case, Defendant’s notice of appeal was due 10 days from the challenged order’s issuance. *Id.* Excluding weekends and holidays, and adding three calendar days for mailing, this means it had to be filed by September 22, 2008. **See Fed. R. App. P. 26(a), (c), & cmt. to 1996 Amendments.** As explained above, the Rules give this Court authority to extend this period for up to 30 days, but not more. **Fed. R. App. P. 4(b)(4); see also Fed. R. App. P. 26(b)** (“For good cause, the court may extend the time prescribed by these rules [b]ut the court may not extend the time to file . . . a notice of appeal (except as authorized by Rule 4)[.]”); *Greenlaw v. United States*, 128 S. Ct. 2559, 2569 (2008) (explaining that firm deadlines for notices of appeal are justified

because they “advance the interests of the parties and the legal system in fair notice and finality”).

Thus, the Court is able to extend Defendant’s time to file his notice of appeal through October 22, 2008, but not beyond – not even for good cause or excusable neglect. **See *United States v. Alvarez*, 249 F. App’x 303, 304 (4th Cir. 2007) (noting that the “time periods presented in Rule 4(b) are mandatory and jurisdictional.”)**. As the instant motion was filed 16 days after the last date on which the undersigned has authority to grant Defendant an extension, Defendant’s motion must be denied.

IT IS, THEREFORE, ORDERED that Defendant’s motion to file an untimely notice of appeal is hereby **DENIED**.

Signed: November 17, 2008



Lacy H. Thornburg
United States District Judge

